

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

knee pain were caused or aggravated by walking on the cement floor at work. He first became aware of his knee conditions on February 23, 2011 and that they were caused or aggravated by his employment on March 10, 2011. Appellant stopped work on January 17, 2012. OWCP accepted the conditions of bilateral internal knee derangement, left posterior meniscus tear, and right lateral meniscus tear. It paid benefits including benefits for January 17, 2012 left knee arthroscopic partial medial and lateral meniscectomies and a July 23, 2012 right knee arthroscopic surgery. Appellant received compensation on the periodic compensation rolls as of January 17, 2012. On January 25, 2013 he returned to light-duty work on a full-time basis.

In order to determine appellant's current condition and to ascertain whether he continued to suffer residuals from his accepted conditions, OWCP referred him, a copy of his medical records, a statement of accepted facts, and a list of questions to Dr. James E. Butler, a Board-certified orthopedic surgeon, for a second opinion examination. In an April 30, 2013 report, Dr. Butler noted appellant's history of injury and reviewed his medical records. He conducted a physical examination and reported that the current objective findings on examination included: normal bilateral knee range of motion; intact sensation and strength bilaterally of the lower extremities; negative varus/valgus, McMurray's test, Lachman, and posterior drawer tests bilaterally; and mild bilateral knee crepitation. Dr. Butler opined that appellant's work injury had resolved with no disabling residuals six months postsurgery and recommended no further medical treatment. He stated that the April 30, 2013 functional capacity evaluation demonstrated that appellant could meet the job duties of a mail processor/clerk, which were classified as light work. Dr. Butler opined that appellant met the overall physical demands of a mail processor. As his bilateral knee examination was essentially normal with no significant abnormalities, appellant could return to work in his unrestricted full-duty position.

OWCP forwarded Dr. Butler's report on June 7, 2013 to appellant's treating physicians for comment. Dr. Helo Chen, a Board-certified internist, reviewed Dr. Butler's report and, although he signed the form noting his agreement with Dr. Butler's assessment that appellant's work injuries had resolved, in his written report of June 20, 2013 he restricted appellant to only six hours a day.

OWCP found a conflict of medical opinion as to appellant's work capacity and referred her, a copy of his medical records, a statement of accepted facts and a list of questions to Dr. Rex Wilcox, a Board-certified orthopedic surgeon, for an impartial medical opinion.<sup>2</sup> In a November 27, 2013 report, Dr. Wilcox stated that appellant was evaluated on July 13, 2013. He noted the history of the injury and that appellant had returned to work with restrictions. Dr. Wilcox also presented his review of the medical record and presented findings on musculoskeletal and neurological examination. He diagnosed medial meniscus tear old; left knee, current medial meniscus tear; right knee, current lateral meniscus tear; bilateral knees with degenerative joint disease as well as torn medial lateral meniscus. Dr. Wilcox stated that there were no objective findings of pain and no swelling or other physical signs of problems with either knee. He stated that there was objective evidence that the accepted work-related conditions had improved since the date of injury as there was no swelling, no instability, good

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<sup>2</sup> Appellant subsequently filed a claim for wage-loss compensation for the period May 23 to August 25, 2013, which OWCP denied by decision dated November 25, 2013.

range of motion, and good strength. Dr. Wilcox noted that appellant had some soreness about the knees, especially when he was standing or walking on his legs for more than two hours at a time. He opined that the accepted conditions had resolved. Dr. Wilcox noted that appellant also had degenerative changes in his knees and the residual soreness was likely due to the preexisting arthritic changes. He stated that appellant had surgery on both of his knees for torn menisci bilaterally and was left with degenerative changes in his knees that were likely the source of his persistent complaints of pain. Dr. Wilcox noted that appellant was working as a clerk, standing for two hours a day and sitting for six hours and he did not believe that this level of activity should change based on his examination. In his December 9, 2013 work capacity evaluation, Dr. Wilcox opined that appellant could perform his usual job with permanent restrictions on sitting, walking, standing, twisting, squatting, kneeling, and climbing. He noted that the restrictions were related to degenerative changes in the knees.

On December 31, 2013 OWCP requested clarification from Dr. Wilcox concerning his report. In a February 26, 2014 report, Dr. Wilcox stated that appellant was working as a clerk, standing two hours a day and sitting six hours a day, and that he was able to do work at this level. He indicated that appellant has degenerative arthritis in his knees, which limited him from doing extremely physical work, and that the April 30, 2012 functional capacity study by Dr. Butler confirmed those findings. Dr. Wilcox also noted that appellant was at his baseline. He stated that appellant's work injuries had ceased/resolved. Dr. Wilcox noted that appellant had injuries caused by the accepted work injuries to the cartilage in his knees and continued to have arthritic changes, which caused pain and limitations. He opined that appellant was able to perform full-duty work as a clerk.

OWCP received a February 21, 2014 request for physical therapy from Dr. Chen, copies of diagnostic testing dated April 29, 2014, and documentation of appellant's medical appointments.

On July 15, 2014 OWCP issued a notice of proposed termination of medical benefits and wage-loss compensation. It found that Dr. Wilcox's impartial opinion established that appellant's accepted conditions had resolved and he no longer had any residuals of his accepted work-related medical conditions or continued disability from work. The restrictions for his work were related solely to remaining degenerative arthritis not work related. Appellant was provided 30 days in which to submit additional evidence or argument.

OWCP received previous diagnostic testing dated May 19, 2011, July 18 and September 5, 2012, and April 29, 2014, as well as documents including statements to the Equal Employment Opportunity (EEO) Commission, a request for notification of absence, return to work medical clearance certification from Dr. Chen, a picture of overflow of trays on a top rack and job offers dated January 25 and August 16, 2013.

In a May 29, 2014 report, Dr. Chen noted improvement in appellant's bilateral knee flexion and extension, but stated that the effects of the work injury persisted and pain and disability from the injury limited appellant's activities of daily living. He noted that appellant returned to modified duty on April 23, 2014. Dr. Chen opined that appellant continued to suffer from disability due to injuries sustained from his work-related accident.

In an August 8, 2014 progress note, Dr. Chen noted appellant's knee pain was stable as long as he was not doing lots of climbing or walking. In an August 8, 2014 report, he noted review of Dr. Wilcox's report and disagreed that appellant could perform the essential parts of the job duties and physical requirements in the proposed job recommendations as indicated on OWCP-5c form dated February 26, 2014. Dr. Chen stated that appellant required further rehabilitation treatment prior to returning to full-duty work. He stated that appellant continued to experience pain in his knees which varied in intensity. Dr. Chen also noted that appellant's medications could affect his ability to work. He opined that appellant was unable to return to work at full capacity at this time and that returning him to full duty would be premature and cause further degeneration of his knees. Dr. Chen recommended a reevaluation to determine appellant's work limitations.

By decision dated September 11, 2014, OWCP terminated appellant's entitlement to wage-loss and medical compensation benefits effective September 11, 2014. It found the weight of the medical evidence of file was represented by the impartial opinion of Dr. Wilcox and established that appellant no longer had any residuals related to his accepted work-related medical conditions.

On October 8, 2014 OWCP received appellant's October 1, 2014 request for reconsideration. Evidence received in support of the reconsideration included appellant's discussion of the evidence and allegations that the employing establishment discriminated, harassed, and retaliated against him, and that the Department of Labor erred in denying his compensation claims, a September 18, 2014 letter from Office of Personnel Management regarding Federal Employees' Retirement System (FERS) retirement payments, an October 2, 2014 e-mail to talk to DOL regarding assistance, a September 8, 2014 request for a copy of his file, and a June 9, 2014 return to work medical clearance certification for modified duty from Dr. Chen.

By decision dated February 26, 2015, OWCP denied modification of its termination decision.

### **LEGAL PRECEDENT -- ISSUE 1**

Once OWCP accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to her employment, OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>3</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup> Furthermore, the right to medical benefits for an accepted condition is not limited to the period of entitlement for disability. To terminate authorization for

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<sup>3</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989).

<sup>4</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

medical treatment, OWCP must establish that a claimant no longer has residuals of an employment-related condition that requires further medical treatment.<sup>5</sup>

Section 8123(a) of FECA provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination.<sup>6</sup> The implementing regulations state that, if a conflict exists between the medical opinion of the employee's physician and the medical opinion of either a second opinion physician or an OWCP medical adviser, OWCP shall appoint a third physician to make an examination. This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>7</sup> In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted appellant's claim for bilateral internal knee derangement; other tear of medial meniscus of the left knee; and right knee tear of lateral meniscus. It eventually retained him on the periodic compensation rolls and paid compensation and medical benefits, including January 17, 2012 left knee arthroscopic partial medial and lateral meniscectomies, and a July 23, 2012 right knee arthroscopic surgery. OWCP found that termination of appellant's compensation and medical benefits were justified based on the impartial medical opinion of Dr. Wilcox.

In order to determine appellant's current condition and to ascertain whether he continued to suffer residuals from his accepted conditions, OWCP had referred appellant to Dr. Butler, a Board-certified orthopedic surgeon, for a second opinion examination. In an April 30, 2013 report, Dr. Butler opined that appellant's work injury had resolved with no disabling residuals. He further opined that the functional capacity evaluation findings and his examination supported that appellant could return to work in his usual position full-duty unrestricted. On June 20, 2013 Dr. Chen reviewed Dr. Butler's report and although he signed a form indicating his agreement that appellant's work-related injuries had resolved with no disabling residuals, he later wrote in his narrative report that appellant could only work six hours a day. OWCP found a conflict in medical opinion requiring resolution through an impartial medical examiner. It referred appellant to Dr. Wilcox to resolve the conflict.

The Board finds that OWCP properly relied on the well-rationalized November 27, 2013 report of Dr. Wilcox. Dr. Wilcox found that the work-related conditions had resolved and the degenerative changes in his knees and residual soreness were a result of appellant's preexisting

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<sup>5</sup> *Mary A. Lowe*, 52 ECAB 223 (2001); *Wiley Richey*, 49 ECAB 166 (1997).

<sup>6</sup> 5 U.S.C. § 8123(a).

<sup>7</sup> 20 C.F.R. § 10.321.

<sup>8</sup> *Gloria J. Godfrey*, 52 ECAB 486 (2001); *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

arthritic changes. Further, he found that the accepted employment-related conditions had resolved and appellant could perform his usual job with permanent restrictions due to the degenerative changes in his knees. OWCP requested clarification and in his February 26, 2014 report, Dr. Wilcox advised that appellant was at his base line working as clerk, which entailed two hours a day standing and sitting six hours a day. He reiterated that appellant's work injuries had resolved and he was able to do full-duty work as a clerk. Dr. Wilcox further opined that although appellant did have injuries to the cartilage in his knees, the arthritic changes in his knees caused pain and limitations.

In his May 29, 2014 report, Dr. Chen opined that appellant continued to suffer from disability due to injuries sustained from his work-related accident. In his August 8, 2014 report, he reviewed Dr. Wilcox's report and noted that Dr. Wilcox had indicated that appellant had injuries to the cartilage in his knees. Dr. Chen stated that this condition was causally related to appellant's accepted work injury and had not ceased. He opined that appellant was unable to return to full-duty capacity as it would cause further degeneration of his knees and appellant required further rehabilitation treatment prior to returning to full-duty work. As Dr. Chen was one of the physicians to have created the conflict, his report is insufficient to overcome the weight afforded Dr. Wilcox's report. Reports from a physician, who was on one side of the medical conflict that an impartial specialist resolved, are generally insufficient to overcome the weight accorded the opinion of the impartial physician or to create a new conflict.<sup>9</sup> The Board finds that as Dr. Wilcox provided a comprehensive, well-rationalized opinion in which he provided physical examination findings, his opinion is entitled to the special weight accorded an impartial medical examiner and constitutes the weight of the medical evidence.<sup>10</sup>

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's compensation benefits effective September 11, 2014.

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<sup>9</sup> See *Jaja K. Asaramo*, 55 ECAB 200 (2004).

<sup>10</sup> See *L.B.*, Docket No. 14-1794 (issued January 7, 2015).

**ORDER**

**IT IS HEREBY ORDERED THAT** the February 26, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: July 21, 2015  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board